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TRUSTS BASED ON ORAL PROMISES TO HOLD IN TRUST, TO CONVEY, OR TO DEVISE, MADE BY VOLUNTARY GRANTEES.

WHERE a trust is claimed because a grantee has violated some oral promise in reliance upon which the conveyance to him was made, it is customary to say that he took upon an oral trust. That, however, is often not a correct statement of the situation unless an oral promise to convey or to devise to a third person, or to reconvey or to devise to the grantor, is necessarily to be deemed an oral promise to hold in trust. Many of the so-called oral-trust deed cases are really cases of contracts analogous to bailment contracts, made for the benefit of the promisee or of third persons and in consideration of the property conveyed, where the contract to convey or to devise is not enforceable as such by the promisee nor by the beneficiary because of the statute of frauds defense, or because of the statute of frauds and the statute of wills combined defenses. As to them, whatever may be true of the strictly oral-trust conveyances, the trust question arises solely because performance of the contract as such cannot be compelled. In the rare instances where the part-performance-of-oral-contracts doctrine can be relied upon to take such a case of oral promise out of the statute of frauds, some courts which would not enforce a trust except in the case of an actual fraudulent intent on the part of the promisor at the time he took title or of some peculiarly confidential relation between the parties, will hasten to enforce the promise as contractual.[1] Part-performance cannot make a promise contractual if it was not so at the start, but in the absence of part-performance many promises which if part-performance had taken

[1] Fitzsimmons v. Allen's Adm. & Heirs, 39 Ill. 440; McNamara v. Garrity, 106 Ill. 384; Simonton v. Godsey, 174 Ill. 28. See Gallagher v. Northrup, 215 Ill. 563, 572-573. Cf. Gay v. Hunt, 5 N. C. (1 Murphey's Law and Eq.) 141. But see Spaulding v. Collins, 51 Wash. 488; Godschalk v. Fulmer, 176 Ill. 64.

place would be called contractual are erroneously deemed purely oral-trust promises. The fact of the matter is that courts and writers, with the best of intentions and despite self-cautioning, too often confuse in thought or in expression the nature of the promise with the effect which the promisee, or the intended beneficiary of the promise, seeks to have chancery give to the breach of the promise. No doubt, it is customary to speak of one who is bound by contract to convey property as "a trustee" for the vendee, but there are substantial differences between the situation of such a person and that of a strict trustee.

The effect of the breach of a contract to convey and the effect of a repudiation of a trust may, however, be identical. It clearly is identical in those cases where the real property has been conveyed solely because of the oral promise of the grantee to convey or devise and in those cases where conveyance took place only because of the grantee's promise to hold the property in trust. The effect is just the same for the precise reasons that in each case the statute of frauds stands in the way of the enforcement of the express promise, as such, and that in each case there will be an unjust enrichment of the grantee if he is allowed to keep the property free from any obligation. If the unjust enrichment justifies equity in interposing in the one case, it justifies it in the other. Although in one case the grantee became expressly a contracting party and in the other case he became expressly a trustee, the consequence of the one grantee's breach of promise and of the other grantee's breach of trust, and of the reliance of both grantees on the statute of frauds, is to strip the grantees of their differences and to put their promises, or the beneficiaries of their promises, as complainants in equity, either in the privileged class of constructive *cestuis que trust* or in the unfortunate class of the remediless. In other words, a grantee who took title on an oral contractual promise to convey the property granted and a grantee who took title on an oral promise to hold in trust, where both grantees have pleaded the statute of frauds as a defense, are in precisely the same position in equity, i. e., each is either in the position of a constructive trustee or in that of one who has a complete statutory defense. On sound theory, it would seem that such a grantee who properly pleads the statute of frauds cannot be recovered against on the express oral promise in the absence of part-performance, nor on the express oral trust; and, if he is to be held, it must be for the very same reason that a vendor who has been paid part or all of the purchase money on an oral contract and who thereafter, in reliance on the statute of frauds, refuses to convey, must refund the payments made, namely, that the court,

while unable to enforce the express promise, will not tolerate the promisor's unjust enrichment.[2] This elementary truth is frequently lost sight of.

There are four general situations where the oral promises of grantees either give rise to or complicate the trust question. They are:

1. Where one person pays the purchase money and has the conveyance made to another, who at the time agrees orally to hold in trust for, or to convey to, or to devise to, the payer.

2. Where a grantor conveys without consideration other than the grantee's promise to hold in trust for, or to convey or to devise to, a third person.

3. Where one person pays the purchase money and has the conveyance made to another who agrees orally to hold in trust for, or to convey or to devise to, a third person.

4. Where a grantor conveys without consideration other than the grantee's promise to hold in trust for, or to reconvey or to devise to, the grantor.

SITUATION I.

Where one person pays the purchase money and has the conveyance made to another who at the time agrees orally to hold in trust for, or to convey to, or to devise to, the payer.

The case where one man pays the purchase money and the title is conveyed by absolute deed to another who is legally a stranger to the payer of the money, i. e., is not the payer's wife or child or a person to whom the payer stands *in loco parentis*, and who makes no express promise, is the typical instance of a resulting trust. Such a trust is one not manifested in writing and is not express, but instead is implied in fact for, while it is in a strict sense of the word an intention trust, it is a trust where the intention is inferable, and is actually inferred, from the conduct and lack of family relationship of the parties.[3]

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[2] For the quasi-contract doctrine see Keener, A Treatise on the Law of Quasi-Contracts, pp. 277-292, and Woodward, The Law of Quasi-Contracts, §§ 95-97.

[3] Since it is an intention trust, it presumably does not exist where the nature of the conveyance is such as to indicate that no trust was intended. In Wolters v. Shraft, 69 N. J. Eq. 215, 70 N. J. Eq. 807, it was accordingly held that where the payer of the purchase money had the deed made to him as "trustee" for a third person, **habendum** "to the only proper use, benefit and behoof" of the third person in fee, and the statute of uses vested the legal title in the third person, there was no resulting trust in favor of the payer against the third person. While it may be possible to disagree with the court's conclusion that to infer such a trust would necessarily contradict the conveyance, the holding against a resulting trust was clearly right because the payer was a party to the deed and not only did not insist upon having an express trust provision in his favor but instead had himself designated as trustee for the third person, and accordingly could

Not being an express trust but an inferred trust, a resulting trust would seem to be out of place—a logical impossibility—where there really is an express, even if only oral, promise or trust. An express oral or written promise or trust of course leaves no room for inference,[4] except the inferences involved in the construction of the express promise or trust. Accordingly, where one person pays the purchase money and the deed is made to another who at the time orally agrees to hold in trust for, or to convey to or to devise to, the payer, the oral agreement on principle leaves no chance for any presumption of a resulting trust even though the grantee who promises is a legal stranger to the payer. Many courts overlook that fact, however, and, disregarding the express oral promise, enforce a trust on the theory that there is a resulting trust.[5] The only

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not properly complain that a presumption of no trust for himself as intended was indulged. If a trust for the payer was actually intended, the burden of showing that fact affirmatively should be thrown upon him. In the instant case the third person to whose use the payer was to hold was one to whom the payer stood in loco **parentis**, so for that reason also that burden was clearly on the payer.

[4] This has been held in the case of a written memorandum of trust made at the time of the trust's creation. Leggett v. Dubois, 5 Paige 114; Anstice v. Brown, 6 Paige 448; Coleman v. Parran, 43 W. Va. 737. But where at the start there is a resulting trust, and later a written declaration of trust is given by the resulting trustee, the resulting trust will not necessarily change to express if such change will be to the prejudice of the **cestui**. Rogers v. Donnellan, 11 Utah 108.

[5] The typical reasoning of the courts is found in Barrows v. Bohan, 41 Conn. 278, 283, where Carpenter J. for the court said:

"That the petitioner paid a portion of the purchase money, as purchaser, before the deed was given, is not denied. The law raises a trust, therefore, in her favor to some extent, unless such trust is defeated by the parol agreement between the parties. The whole doctrine of resulting trusts rests upon a presumed agreement between the parties. When the actual agreement between the parties is identical with the agreement which the law will imply from the circumstances, as in this case, there can be no conflict and no danger that the real intentions of the parties will be defeated by operation of law. Such an agreement therefore will not defeat a resulting trust."

Where one person pays the purchase money and the deed is made to another who is not the payer's wife, legitimate child, or a person to whom the payer stands in loco **parentis** or is under a statutory duty to furnish support, practically all, if not all, courts regard the trust as resulting even though there is an oral promise to convey or to devise or is an oral-trust agreement, provided the oral agreement does not impose on the grantee duties which the law would not have imposed in its absence, i. e., provided the oral promise is merely to do that which the court of chancery would have compelled the promisor to do in the absence of the promise:

Tillman v. Murrell, 120 Ala. 239; Carlson v. Erickson, 164 Ala. 380; Crosby v. Henry (Ark.), 88 S. W. 949; Moultrie v. Wright, 154 Cal. 520; Gerety v. O'Sheehan, 9 Cal. App. 447, 99 Pac. 545; Booth's Appeal, 35 Conn. 165; Barrows v. Bohan, 41 Conn. 278; Ward v. Ward, 59 Conn. 188; Murrell v. Peterson (Fla.), 52 So. 726; Williams v. Brown, 14 Ill. 200; Smith v. Smith, 85 Ill. 189; Furber, v. Page, 143 Ill. 622; Brenneman v. Schell, 212 Ill. 356; Prow v. Prow, 133 Ind. 340; Franklin v. Colley, 10 Kan. 260; Rayl v. Rayl, 58 Kan. 585; (cf. Zellmer v. Koch (Kans. App.), 58 Pac. 1012); cf. Keller v. Kunkel, 46 Md. 565; Cooley v. Cooley, 172 Mass. 476 (semble); Davis v. Downer, 210 Mass. 573, 575 (semble); Thomas v. Thomas, 62 Miss. 531 (cf. Runnels v. Jackson, 1 How (Miss.) 358, and Robinson v. Leflore, 59 Miss. 148); cf. Hall

correct legal theory to sustain the enforcement of a trust against the plea of the statute of frauds would seem, however, to be that there is a constructive trust raised to prevent the grantee, who dishonestly seeks to retain as his the property which was conveyed to him solely because of his promise, from being unjustly enriched. Equity says in effect to the dishonest grantee:

"True, your agreement or trust was express and hence you were not a resulting trustee, and true, you have relied on the statute of frauds and so cannot be compelled to perform that express promise to convey or express trust, but chancery cannot permit you to retain the fruits of your dishonest act and so you must hold for and convey to the person who has in the eyes of chancery the best right to that which you cannot keep. That person in this instance is the payer of the purchase money, since your grantor, having been paid his price for the property, has no equity."[6]

What has been said above about the implication of a trust being impossible where an express promise or trust is proved applies in theory as much where the grantee is the wife or child of the payer of the purchase money as where the grantee is legally a stranger to him. Indeed, it applies there more, if anything, for where the grantee is the wife or child of the payer of the purchase money

v. Congdon, 56 N. H. 279; Converse v. Noyes, 66 N. H. 570; Warren v. Tynan, 54 N. J. Eq. 402; Reeves v. Evans (N. J.) 34 Atl. 477; cf. Levy v. Ryland (Nev.) 109 Pac. 905; McCoy v. McCoy, 30 Okla. 379 (semble); Arnold v. Harris (Tenn.) 52 S. W. 715; Herriford v. Herriford (Wash.) 139 Pac. 212 (semble); cf. Currence v. Ward, 43 W. Va. 367.

In the above list the compare cases are cases where the deed was made to the grantee to secure the grantee for money loaned to purchase the property conveyed. They are usually classed as absolute-deed-as-mortgage cases, but they are clearly a combination of the absolute-deed-as-mortgage situation and this so-called resulting trust situation, Borrow v. Borrow, 34 Wash. 684. Indeed the grant in such case is often spoken of as a resulting trust by way of mortgage. Reeve v. Strawn, 14 Ill. 94, 96-97; Watson v. Hoffman, (Miss.) 61 So. 699. As such, it has been deemed in one case to be affected by the statute abolishing resulting trusts. Crane v. Read, 172 Mich. 642.

Where the agreement is that the grantee shall hold for the payer for his life and then keep for himself or vice versa, the trust for the payer is enforced to the extent specified, the resulting trust being deemed rebutted except to the extent of the express trust for the payer. Milner v. Freeman, 40 Ark. 62; Larisey v. Larisey, (So. Car.) 77 S. E. 129. See Cook v. Patrick, 135 Ill. 499.

But while the courts in general treat the trust as resulting despite the oral agreement, there is an occasional judicial expression of misgiving on the point. For instance, in Hall v. Congdon, 56 N. H. 279, 281, Cushing, C. J., said in reference to the contention that the trust was express because of the express oral agreement:

"There is no doubt that the case lies very near the line and the distinction is pretty nice that places it outside instead of inside of the statute of frauds."

[6] A state statute which abolishes the presumption of a resulting trust for the payer of the purchase money, but makes an exception when there is an express oral trust for the payer, really recognizes by that exception the fact that the latter trust is not resulting. If instead of leaving it stand as constructive, however, the statute makes it an express exception to the rule that resulting trusts cannot be enforced, the statute follows the judicial tradition. See General Statutes of Kansas, 1909, §§ 9699-9701.

there is a presumption of fact of gift or advancement as intended, and hence a presumption or inference against a trust. If, then, the oral promise of the wife or child to hold for the husband or father payer of the purchase money rebuts the presumption of no trust,—and in all jurisdictions where the statutes do not abolish resulting trusts it does rebut that presumption,—it is apparent that inference has given way to demonstration and that the express promise has made a resulting trust no longer possible. Many courts seemingly think that the express oral promise exhausts itself in rebutting the presumption of a gift, and that in consequence the general presumption of a trust as intended is left to control the court's action, but that is obviously a fiction in all cases where an express oral promise to hold in trust for, or to convey or to devise to, the payer is proved.[7] No matter if the court does think that it is enforcing a resulting trust, what it really is doing is enforcing a constructive trust to prevent the grantee's unjust enrichment through his dishonest repudiation of his promise.[8]

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[7] Where no express promise is proved and a presumption of advancement is rebutted by facts giving rise to a presumption of no advancement, there inference has not given way to proved intent and accordingly an inference of trust indulged makes the trust strictly resulting. See Dana v. Dana, 154 Mass. 491, for an instance. See also Elliot v. Elliot, 2 Ch. Cas. 231; Woodman v. Morrel, 2 Freem. 33; Garrett v. Wilkinson, 2 De G. & Sm. 244; Stock v. McAvoy, L. R. 15 Eq. 55; Pool v. Phillips, 167 Ill. 432; Skahen v. Irving, 206 Ill. 597. Cf. Paddock v. Adams, 56 Oh. St. 242, where the presumption of advancement had to be weighed against a presumption founded on the fact that the deed named the grantee as "trustee" but did not disclose the trust. A trust found solely from weighing opposing inferences or presumptions is implied in fact or resulting, but one found because a proved promise overcomes a presumption of no trust is in no sound sense implied in fact or resulting.

[8] Where a man pays the purchase money and the deed is made to the payer's wife or child and an oral agreement to hold in trust for or to convey to the payer is shown to rebut the presumption of fact of a gift or advancement, the majority view is that the trust is nevertheless resulting if the oral agreement is no different in its terms from the agreement which would be implied if the grantee were legally a stranger to the payer of the purchase money, but there is a strong minority view to the effect that the trust is express. That the trust is resulting is the view in Smithsonian Institution v. Meech, 169 U. S. 398; Harden v. Darwin, 66 Ala. 55; Milner v. Freeman, 40 Ark. 62; Harbour v. Harbour, 103 Ark. 273; Corr's Appeal, 62 Conn. 403; Sherman v. Sherman, 20 D. C. 330; Dorman v. Dorman, 187 Ill. 154; Bachseits v. Leichtweis, 256 Ill. 357; Cooley v. Cooley, 172 Mass. 476 (semble); Howe v. Howe, 199 Mass. 598 (semble); Sherwood v. Davis, 168 Mich. 398 (semble); Price v. Kane, 112 Mo. 412; Curd v. Brown, 148 Mo. 82 (semble); Bartlett v. Bartlett, 15 Neb. 593; Bailey v. Dobbins, 67 Neb. 548; Lahey v. Broderick, 72 N. H. 180; Duvale v. Duvale, 54 N. J. Eq. 581; McGhee v. McGhee, (N. J. Eq.) 86 Atl. 406 (semble); Yetman v. Hedgeman (N. J. Eq.) 88 Atl. 206; Livingston v. Livingston, 2 Johns Ch. 537; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, (but see Binkowski v. Moskielwitz, 128 N. Y. Supp. 803; Gould v. Gould, 51 Hun. 9; Jeremiah v. Pitcher, 26 N. Y. App. Div. 402, affd. 163 N. Y. 574); Short v. Short, 62 Ore. 118; Hickson v. Culbert, 19 So. Dak. 207; Shepherd v. White, 10 Tex. 72 (semble); Bickford v. Bickford's Estate, 68 Vt. 525; Watson v. Smith, 70 Vt. 19 (semble); cf. Borrow v. Borrow, 34 Wash. 684; Collinson v. Collinson, 3 De G. M. & G. 409;

The result in principle is that in situation 1 the oral agreement to convey, to devise or to hold in trust keeps the trust enforced from being resulting and makes it purely constructive. Accordingly the cases where a trust is enforced regardless of the good intent of the grantee at the time of his promise and regardless of the lack of a solicitation of the conveyance by him or of a special confidential relation between himself and the payer of the money at the time of his promise—and none of the resulting trust cases, so-called, make any of these things necessary to the trust's enforcement—are logically cases in point in favor of the enforcement of constructive trusts in situations 2 and 3 hereinafter discussed. Situation 2, the case of an absolute conveyance to a grantee on his oral trust for, or promise to convey to or devise to, a third person, is, indeed, exactly situation 1 with the exception that in situation 1 the grantor gets paid while in situation 2 he does not, and that in situation 1 the purchase money is paid by the *cestui* of the oral trust or by the oral promisee, while in situation 2, as no purchase money is paid, the *cestui* of the oral trust or the beneficiary of the oral promise to convey or devise is at most only a gift beneficiary. But while the fact of payment by the third person express-oral-*cestui* makes it perfectly clear in situation 1 that equity should make such third person the *cestui* of the constructive trust which it raises against the grantee, we shall see that in situations 2 and 3 a good argument can be advanced for even the gift beneficiary of the oral promise.

SITUATION 2.

Where a grantor conveys without consideration other than the grantee's promise to hold in trust for, or to convey or to devise to, a third person.

Where the oral promise to convey to or devise to, or to hold in trust for, some one other than the grantor is not accompanied by

Scawin v. Scawin, 1 Y. & C. C. C. 65; Williams v. Williams, 32 Beav. 370 (semble); Re Gooch, 62 L. T. N. S. 384 (semble); Devoy v. Devoy, 3 Sm. & G. 403 (semble).

That the trust is not resulting but express is the view in Kinley v. Kinley, 37 Colo. 35; Montgomery v. Craig, 128 Ind. 48; Murray v. Murray, 153 Ind. 14; Andrew v. Andrew, 114 Ia. 524; Hoon v. Hoon, 126 Ia. 391; Mullong v. Schneider, 155 Ia. 12; Chapman v. Chapman, 114 Mich. 144; Johnson v. Johnson, 16 Minn. 512 (semble); Ryan v. Williams, 92 Minn. 506 (semble); Gibson v. Foote, 40 Miss. 788 (semble) Johnson v. Ludwick, 58 W. Va. 464; Ludwick v. Johnson, 67 W. Va. 499. The jurisdictions that treat the trust as express do not take the next step of declaring that a constructive trust is enforceable against the grantee to compel him to give up the unjust enrichment due to his retention of the property in fraudulent breach of the oral promise to hold in trust, to convey or to devise. What the jurisdictions which call the trust resulting are doing, however, is taking, without realizing it, just that step. They do not realize it because the constructive trust which they enforce they label resulting.

the payment of the purchase money by that someone, there clearly is no resulting trust. But, as we have seen, the express promise would be enough, on principle, to keep the trust from being resulting even if the intended beneficiary had paid the purchase money. But while in situation 2 no resulting trust could possibly exist, a retention by the grantee of the granted land in repudiation of his orally assumed obligation would constitute unjust enrichment and to prevent that result equity ought to declare a constructive trust. Under the authorties it is a debatable question whether something more than fraudulent retention is not needed for such a constructive trust to be raised and that question we shall go into carefully shortly, but first it seems desirable to consider the question of the proper beneficiary of such a constructive trust if one is to be raised.

If a constructive trust is to be enforced where there is a conveyance on an oral promise by the grantee made to the grantor that the grantee will convey to or devise to, or hold in trust for, a third person who pays nothing, what person is properly to be designated constructive *cestui?*. Dean AMES was firmly of opinion that the correct rule or ascertaining the *cestui* of a constructive trust in the statute of frauds cases was to adopt and apply the principle of *restitutio in integrum*,[9] and on that principle he favored in this situation 2 the raising of the constructive trust in favor of the grantor.

But the cases of legacies and devises on oral trust, which are almost unanimous in enforcing a constructive trust in favor of the intended *cestui* regardless of whether the prospective legatee or devisee had or had not a bad intent at the time of promising, raise the question of whether that principle of *restitutio in integrum* is after all the most fundamental. In the case of legacies and devises on oral promises which are later repudiated by the legatees or devisees, it is well settled that the constructive trust raised will be enforced in favor of the intended beneficiary *cy pres* the testator's intentions. He did not express his intentions in proper form for them to be enforced as such, but he did create a trust situation and equity can give the *cestui*-ship to the intended beneficiary if it thinks him entitled to it, and it does give that *cestui*-ship to him just because it thinks such disposition of it more fitting than to give the equitable interest to the next of kin or heir, or even to the residuary legatee or residuary devisee.

[9] Ames, Lectures on Legal History, 425-431. See same passages in 20 Harv. L. Rev. 549, 550-55.

Dean AMES of course felt that the courts were in error in the legacy and devise-on-oral-promise cases in enforcing a trust for the intended *cestui* except in those cases where the legatee or devisee had an actual fraudulent intent at the time of making the promise, in which latter event he said that the repudiating grantee "is guilty of a tort and equity may and does compel the devisee to make specific reparation for the tort by a conveyance to the intended beneficiary"[10]; but is the theory of the specific reparation of a tort, even when applied to the case of actual fraud at the time of the promise, any easier to grasp or to assent to than is the occasionally advanced theory of the specific performance of the oral agreement in favor of the beneficiary awarded to prevent the successful consummation of the fraud?[11] And, in addition, is it true that where there is no actual fraudulent intent at the time and yet the legatee or devisee cannot be allowed to be unjustly enriched by retention of the property in repudiation of the promise on which the property was secured, and where restitution to the testator is impossible because he is dead, the heir, next of kin, residuary devisee, or residuary legatee, has any greater claim to chancery's appointment of him as constructive *cestui* than has the orally designated and agreed upon *cestui?* If the tort theory is preferable, then even though it be no legal tort for one to promise honestly and later to decide to retain dishonestly, why may not such action be deemed a tort in equity? In enforcing strict trusts equity makes its own law to fit its own creation, and it may recognize an equitable tort, i. e., a tort remediable only in equity, regardless of the fact that there is no corresponding legal tort. Specific reparation of what equity must call a tort because the law calls it one may be a higher principle

[10] Ames, Lectures on Legal History, 430-431. See same passage in 20 Harv. Law Rev. 549, 554.

[11] In a case of a deed on an oral promise, but in language equally applicable, it would seem, to a case of devise on an oral promise, it is said: "So where a trust is sought to be established from the violation of an oral agreement purporting to create a trust and a court of equity upholds the trust and enforces specific performance, the trust is not an implied or constructive trust within the statute [of frauds]. (See Bellasis v. Compton, 2 Vern. 294). The court in granting relief in case of an oral agreement proceeds upon the ground of fraud, actual or constructive, and enforces the agreement notwithstanding the statute, by reason of the special circumstances."—Andrews, J., for the court in Wood v. Rabe, 96 N. Y. 414, 423. The sounder view would seem to be that the court of equity neither repairs a tort nor enforces specifically the oral agreement, but that it enforces a constructive trust in favor of the party substantially damaged by the breach of promise and against the person unjustly enriched at his expense through that breach. If there is fraudulent intent at the start, the trust is constructive at the start because the unjust enrichment is coeval with the receipt of title. If the fraudulent intent comes later, the unjust enrichment begins when the promise is repudiated and the property is retained despite that repudiation.

than restitution, but specific reparation of what equity must call a tort because the law calls it one may be a higher principle than restitution, but specific reparation of what equity calls a tort even though the law does not call it one, is certainly a higher principle than that of restitution. If that were all that could be said, however, the charge of question-begging would of course be open, but the equitable tort argument is not the real one in behalf of the intended *cestui* as constructive *cestui*. It is only thrown in to emphasize the point that the *restitutio in integrum* principle is only to be resorted to where no other principle can be found, as, for instance, in the case of a deed on an oral trust for the grantor or in the quasi-contract cases.

But in the case of devises on an oral trust for third persons who pay nothing, just as in the case of conveyances on an oral trust for third persons who pay the purchase price, the *restitutio in integrum* principle need not be called into play, or, if it is called into play, has a very different application from what has heretofore been imagined. In order to make that clear, however, some elementary propositions must be stated.

It is well settled that equity will enforce an express trust, manifested in a properly executed writing and intended to be effective at once, even though the *cestui* is a volunteer. The trust is at once a completely existing trust and straightway the interest of the cestui is vested, in the view of equity, and, therefore, actually. It is also well settled that even though the statute of frauds requires an express trust of land to be manifested in writing, an oral trust of land is nevertheless not a nullity, for if the trustee sees fit to act under it and carry it out, it is as much entitled to the protection of equity as is any other trust.[12] Even the trustee's creditors cannot prevent nim from carrying out the trust if he wishes to do so and if the trust is for legal purposes.[13] Another way of stating the same proposition is that the oral trustee, while he lives, is the only one who can plead the statute of frauds. Now if an oral trust of land has been created and fully performed, what kind of a trust has been performed? It was not a resulting trust because it was not implied in fact or inferred but was express. It was not a constructive trust, because a constructive trust cannot exist without either actual or constructive fraud on the part of the party to be charged as trustee and, by our supposition, the trustee was honest at the start and all through. The trust then was an express trust. Not only so, it was

[12] See Ames, Cases on Trust, 2 ed. 178-181.

[13] Id.

an express trust which, even though repudiated, equity would have enforced affirmatively in the absence of a plea of the statute interposed in proper time by the trustee. And when was it an express trust? At the time when it would have been one if manifested from the start in writing, of course, for at that time, if applied to, equity would have affirmed its existence in the absence of a plea of the statute. It is apparent, therefore, that from the time of the creation of an oral trust for a third person down to the repudiation of the trust and the interposition of the statute of frauds defense to defeat its enforcement, the intended *cestui que trust* actually is *cestui que trust* with all the pecuniary interest and all the rights and privileges unto such a one appertaining. This is, of course, all on the supposition that the trustee was honest at the start and only decided to act dishonestly some time after the testator's death.[14]

The consequence of the considerations just advanced is that up to the time when the trustee relies on the statute of frauds to defeat the trust, which he honestly undertook, the *cestui que trust* of the oral trust is the only party having a property right which equity can or does deem paramount. It is that paramount property right which the trustee, by aid of the statute of frauds, cuts off and in practical effect, whatever may be true in strict theory, appropriates to himself. The legal title was, by supposition, honestly acquired by him but it was acquired burdened with the equitable duty to devote it to the *cestui's* benefit as per the terms of the trust. Now by the aid of the statute as a sword the trustee has terminated that equitable duty, obversely spoken of as the *cestui's* property interest, and has unjustly enriched himself. Where, before he used the statute in that way, he had the legal title and the *cestui* the so-called equitable title, after that use of the statute he had, so far as the express trust is concerned, the legal title and the *cestui* nothing. For a trustee to destroy the *cestui's* interest without compensation and thereby to increase his own estate,—for him to swell his own assets at the expense of the *cestui*, —is a gross breach of trust. In a real, though perhaps not in a theoretical sense, a trustee who destroys his *cestui's* interest by the aid of a statute acquires the *cestui's* interest and merges it in his legal title. Certainly in equity, where form is not important, it is to be regarded as an acquisition, and, moreover, a dishonest acquisition. There is both dishonest acquistion and dishonest retention. On a strict analysis there was honest acquistion of the legal title subject

[14] The case of a devisee, honest when he made the promise, but getting dishonest intent thereafter and before the testator died, seems not to have been adjudicated. It would, doubtless, be treated the way the case of dishonest intent at the time of making the promise is dealt with.

to an express trust, which was enforceable at the start and remained enforceable as an express trust while the trustee remained honest; then there was a dishonest acquisition of the so-called equitable title of the *cestui;* and lastly there was dishonest retention of the full title to the property in repudiation of all claims. In any case there was actual fraud.[14a] Under those circumstances, for whom ought a constructive trust to be raised? Not for the original creator of the trust, for he is dead. Not for the heir or the residuary devisee, for the honesty of the specific-devisee trustee lasted long enough to give the intended *cestui* a defeasible equitable interest and to make it clear that neither the heir nor the residuary devisee could ever have any valid claim, except in a court which should feel that to give the intended *cestui* the property on a constructive trust would be to go in the teeth of the statutes of frauds and of wills or of one of those statutes. The only man having any equity is the man defrauded and that man is the intended *cestui,* who for a time actually was a real express *cestui,* but who has been robbed of his equitable interest by his trustee to the latter's *pro tanto* enrichment. The constructive trust should be declared in favor of the man at whose expense the unjust enrichment of the trustee has taken place and that man is the *cestui* of the express oral trust. The principle of *restitutio in integrum* itself requires that he be designated as *cestui,* since the previous condition to be restored is the situation just before the unjust enrichment.[15]

[14a] In the bequest on oral trust case of Winder v. Scholey, 83 Ohio St. 204, 216, Summers, C. J., for the court, said: "It is conceded that in cases of actual intentional fraud equity will raise a trust, notwithstanding the statute of frauds or the statute of wills. In equity what difference can there be whether the fraudulent intention existed at the time the testator acted or not until it was time for the devisee to act? In either case the testator acted upon the faith that the devisee would keep his promise; the result of his refusal or failure to do so is the same in either case and equally fraudulent."

[15] But the argument just advanced must not be urged too far. Where it is certain that the devisee or grantee is to hold in trust for somebody and it is only a question of naming that somebody, the argument seems conclusive. But until it is decided that there is to be a constructive trust for some one, the argument is not very helpful. To make this clear it is only necessary to consider the case of an oral declaration of trust by the owner of realty in favor of, or his oral promise to convey to or to devise to, (1) a volunteer and (2) a purchaser. Where an oral declaration of trust is honestly made, one view of the situation is that a trust arises at the time of the oral declaration, and that, while the trust cannot be repudiated without the unjust enrichment of the trustee, such unjust enrichment is the very kind which the statute meant to permit in order that chancery might not be subjected to the risk of being induced by perjured testimony to enforce oral trusts which never were declared. Another view of the situation is that no trust arises at the time of the oral declaration, and that even in the eyes of chancery the oral declaration of trust is only a promise. On this second view, where the declaration is in favor of a volunteer, it is only a promise of a gift of the equitable interest, and hence revocable, and where the declaration of trust is paid for, it is only an oral contract to convey the equitable interest as to which usually no part-perform-

The statute of frauds expressly excepted constructive trusts from the writing requirement and it is no valid objection to a constructive trust raised on sound constructive trust principles that it will give the beneficial interest to the very person who was *cestui* of the express oral trust. When Parliament and the American legislatures said that constructive trusts could be enforced without the necessity of written evidence, they meant that they should be enforced in favor of the person having the best claim on constructive trust principles, and in the case supposed the intended *cestui* is the person having the best claim. So long as the express trust as such is not enforced, so long as only unjust enrichment is prevented and the party sought to be defrauded is given only that which will prevent the unjust enrichment, the legislative intent is satified. For any breach of the express trust that does not unjustly enrich the trustee, the statute of frauds is a defense, as it is to the attempted enforcement of any of the terms of the express trust as such. Those terms, however, may be considered in determining the extent of the enrichment and of the injustice. But to say that a constructive trust to the extent of the unjust enrichment cannot be raised for the party defrauded just because he was the *cestui* of the express trust is to defeat the legislative intent rather than to carry it out.

What has been said of devises on oral trusts is just as true of conveyances on oral trusts for third persons. If the grantee had a fraudulent intent at the time of taking title, there was a legal tort which equity could repair specifically and an express oral promise which it could enforce specifically by making the grantee hold for the intended *cestui*. In the eyes of a court of law the grantor is the one defrauded, but his damages are only nominal; and in a court of equity it is the party really damaged, the party at whose expense the fraudulent promisor is unjustly enriched, namely, the intended *cestui*, that should be given relief. The inadequacy of the legal remedy—indeed the absence of any satisfactory legal remedy—justi-

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ance or other act making it specifically enforceable has taken place. Whichever view is entertained, it would seem clear that ordinarily the oral declaration of trust may be nullified by the declarer, but that any payment which he accepted for the declaration, whether the payment be money or property, must be refunded by him. The important thing to notice here, however, is that the argument which will serve to dictate the choice of a constructive **cestui**, where the repudiation of an oral promise on which a devise or grant in trust for, or to convey or to devise to, a third person was obtained necessitates a constructive trust for somebody, is not sufficient to cause the raising of a constructive trust where one who orally declared himself a trustee for another repudiates the trust. But when it is determined that the grantee must be made a constructive trustee for some one, so as to prevent the grantee's unjust enrichment, then the fact of the intended cestui's having been already a genuine though voidable **cestui**, seems persuasive of his right to be chosen constructive **cestui**.

fies equity jurisdiction and *cy pres* the intentions of the grantor equity makes the *cestui* of the oral trust, who, like the sole beneficiary of a contract, is the only person damaged more than nominally by the failure of performance, the *cestui* of the constructive trust.[15a] On the other hand, if the grantee had an honest intent at the time and became dishonest in intent only later, the express oral *cestui* clearly became a real *cestui* and remained one until the dishonest repudiation of trust defeated his interest as express *cestui* to the corresponding acquisition of unjust enrichment by the trustee, and, as the fraudulently deprived party, the *cestui* of the oral trust is entitled to be the *cestui* of the constructive trust based on that deprivation and that enrichment.

In confirmation of what was said of situation 1, it should be noted here that if the *cestui* of the oral trust is to be made the *cestui* of the constructive trust where he does not pay anything, clearly he should be *cestui* of that trust where he is the payer of the purchase money for the property conveyed on the oral trust. If the volunteer is to be given equity's countenance, the value-giver must be treated fully as well.

But the demonstration that the *cestui* of the oral trust is dishonestly dealt with by his trustee, and accordingly is entitled to be *cestui* of the constructive trust raised, applies strictly only when the oral arrangement is expressly one of trust. What of the case where the deed is simply on the grantee's promise to convey or to devise to a third person? That is more nearly a case of contract than of trust, but there again, in America at least, the contract principles lead us to favor the intended beneficiary. The oral contract is not a nullity. It is a good contract enforceable except when the statute is pleaded. And on that contract who can sue? In a large majority of the American jurisdictions, the beneficiary who is variously known as a "sole" or a "gift" or a "donee" beneficiary, may sue, and is the only one, indeed, who can recover substantial damages.[16] If, then, the beneficiary's right to sue is the only right worth while, and if that right is rendered ineffective by the grantee's unconscionable use of the statute of frauds as a defense, any constructive trust raised

[15a] The cy pres argument is a make-weight argument in favor of the intended cestui as constructive cestui. In the legacy and devise cases the cy pres argument has great weight because the testator clearly meant his next of kin, residuary legatee, heir, or residuary devisee, not to have the property. But in the deed cases where the conveyance is for the benefit of a third person, the grantor just as clearly means that he himself shall no longer have any interest and accordingly he should be given no interest in equity unless there are insuperable reasons against giving the intended cestui the interest which chancery has to confer. Such insuperable reasons appear not to exist.

[16] Wald's Pollock on Contracts, 3 ed., 242, 249-255.

against the grantee should be raised in favor of the beneficiary. A constructive trust raised against a wrongdoer should, of course, be raised in favor of the person at whose expense the enrichment has taken place, and in the case supposed that person is the beneficiary of the oral promise.[17]

But now for a further word on the question whether actual fraudulent intent at the time of making the oral promise should be made a prerequisite to a constructive trust. The first thing to notice is that no court adheres to that strict rule, for, in all courts, if there was between the grantor and grantee a relation of special trust and confidence the grantee's good intent at the time of making the promise will not enable him to keep the trust *res* with impunity.[18] But the important thing to remember is, what our discussion of the beneficiary problem has made clear, that the old view that fraud at

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[17] In Ahrens v. Jones, 169 N. Y. 555, 560, Haight, J., for the court said:

"It is true there is no express trust created by the deed, or by the promise made by the defendant but, notwithstanding this, a court of equity is not bereft of power to act, for it may interpose to prevent a wrong, and for that purpose it may declare the grantee a trustee ex maleficio for the protection of the grantor's intended beneficiaries. Such a trust does not affect the deed, but acts upon the gift as it reaches the possession of the grantee, and the foundation for the trust is that equity will then interfere and raise a trust in favor of the persons intended to be benefited in order to prevent a fraud."

Even though the court was influenced in this case by the fact that the grantor made the deed in view of his approaching death, its reasoning is just as sound in its application to a deed on an oral trust for, or oral promise to convey to or devise to, third persons, made by a grantor who expects to continue alive.

[18] In the case of Gemmell v. Fletcher, 76 Kans. 577, 586-7, Graves, J., said of a broken promise that had been made by a husband to his dying wife that if the wife would not make a will, which she accordingly did not do, he would convey to the plaintiff certain land, the legal title to which was in the husband by mistake but the equitable title to which was in the wife as resulting cestui:

"In cases where a trust has resulted because of false and fraudulent representations used in obtaining a conveyance, and the grantee affirmatively and actively induced the execution thereof, the words 'actual' and 'positive' frequently occur in the opinions to characterize the fraud used. And in such cases it has been said that the fraud must have been present as a producing cause of the transaction. In cases like the present, however, where the fraud is perpetrated by the refusal to consummate the transaction, it is otherwise. In this case the defendant received the title to the land in controversy by mistake. He had no right or interest therein and claimed none. He recognized at all times the ownership of his wife. The promise made to her on her death-bed was a recognition of her title at that time. By this promise to convey the land to the plaintiff he prevented her from disposing of it by will. He knew that she permitted the situation to remain as it was because of such promise. Their relationship—that of husband and wife—was confidential in the highest degree known to the law. The refusal on his part to perform this promise, thereby retaining the property as his own, is a fraud upon his dead wife, and a fraud upon the plaintiff. The transaction on its face appears innocent on the part of the defendant prior to his refusal to convey, but in the absence of any indication to the contrary it will be presumed that when he made this promise to his wife he then intended to do what he finally did do (Larmon, et al., v. Knight, et al., 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229). Courts of equity do not permit persons thus to profit by their own perfidy. Justice, reason and authority concur in the conclusion that the facts here shown are sufficient to create a constructive trust, and we so find."

the time of making the promise was actual fraud, and that fraud at the time for performance was constructive fraud, is unsound. In both cases the fraud is actual fraud. Fraud in retention is just as much actual fraud as is fraud in acquisition, and, as actual fraud, calls just as strongly for redress in equity. It cannot be reiterated too often that "There is no law which requires a fraudulent undertaking to be manifested by writing"[19] and that equity will always enforce a constructive trust to prevent actual fraud. Those jurisdictions which have failed to enforce a constructive trust, to prevent fraudulent retention of the trust *res* of the oral trust, have done so because they have not realized that the fraud was actual fraud and because they have wondered what operation section seven of the statute of frauds would have if fraudulent retention were made a sufficient constructive trust test.[20] The fraud is, however, actual fraud, as we have seen, and as for the operation of the statute, it must be remembered that Parliament and our American legislatures expressly authorized the full enforcement of constructive trusts without the necessity of written evidence and, therefore, there can be no sound complaint as long as express oral trusts are not enforced against a plea of the statute. What the courts that have refused to make fraudulent retention of trust property by the oral trustee to his own unjust enrichment serve as a constructive trust basis have done has been to substitute their own conception of proper legislation for that of the legislature. Parliament and the American legislatures have meant by section eight of the statute of frauds to restrict section seven's operation in every way that the resulting and the constructive trust doctrines fairly require, and for the courts to refuse to allow that restriction to take place is for them to legislate unjustifiably.

Before stating the holdings of the courts it seems desirable to quote some clear judicial utterances on the fraudulent retention question, which is the same question whether the deed was on an oral trust for a third person or for his grantor.

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[19] Bleckley, C. J., in Brown v. Doane, 86 Ga. 32, 38.

[20] In Salter v. Bird, 103 Pa. St. 436, 447, Gordon, J., said of a conveyance by A to B on an oral trust for C, where C sought to have a trust enforced in the absence of evidence of B's solicitation of the conveyance or of his fraudulent intent at the time of promising: "If such a trust is not within the statute, then there can be none that comes within it." Such a statement overlooks oral declarations of trust by owners of land, who can go back on their declarations without being made constructive trustees of the lands which they thus orally promised to hold in trust, and ignores the fact that the statute necessarily protects an oral trustee from being recovered against for breach of any express provision of the oral trust, if only he pleads the statute. The statute of frauds will have plenty of operation even if it is not allowed to be used to promote unjust enrichment.

In *Becker* v. *Neurath*,[21] where the grantee agreed to hold on an oral trust for a third person, CARROLL, J., said for the court:

"It is true that the doctrine of constructive trusts rests upon the ground that the grantor has been induced to part with his title by the fraud of the grantee; but it does not follow by this that it is necessary to show by fact or circumstance actual intentional fraud practiced at the time by the grantee. When the grantee by act or word has induced the grantor to make the conveyance under an agreement or promise that certain parol conditions attached to it will be complied with, the law will imply a fraud from the failure of the grantee to perform the annexed conditions. If A tells B that he will take the title to property and hold it for the use and benefit of some other person, and by reason of this promise B is induced to and does convey the title, A will be deemed to have practiced a fraud upon B if he fails to observe the promise under which he obtained the conveyance. It is the end that the law looks at, and not the means by which this end is accomplished. If a grantee is enabled to obtain the title to property by an express promise to hold it for the use of another and he fails to observe the promise, he is in fact and truth as much guilty of fraud as if by deceit, persuasion, cunning, or other evidence of actual fraud he had obtained that which otherwise would not have come to him. No matter whether the grantee secured the property by what may be termed legal or constructive fraud, or by actual fraud, if he fails to make that disposition of the property that the grantor intended he should make, and that he agreed to make, the person who, except for the promise, would have been the beneficiary of the estate had [has] been defrauded of that which was justly due him.

"To say that a grantee, who by misrepresentation, deceit, or undue influence, obtains the title to property under a promise that he will hold it for certain uses, will be compelled by equity to perform the trust, but that the grantee who merely promises the grantor that he will hold the title for certain purposes and upon this promise the grantor is induced to convey it, will not be required to perform the trust, would be to make a distinction without a difference, and one that would often result in gross injustice."

While in Kentucky the seventh section of the statute of frauds is not in force, the fourth section of the statute and the parol evidence rule furnished the occasion for the foregoing language. That language is, however, just as apropos in a jurisdiction where the seventh section of the statute does exist.

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[21] 149 Ky. 421, 427-8, 149 S. W. 857, 860.

In *Hall* v. *Linn*,[22] where in addition to agreeing to hold for the grantor the grantee agreed to reduce the terms of the trust to writing, HELM, J., said:

"What difference does it make in principle whether a trustee by fraud or deceit prevents the reduction of the trust agreement to writing at the time the trust is created, or with wrongful intent neglects and refuses to afterwards make a written declaration of material conditions thereof, in accordance with his promise so to do, which promise is also part of the original contract? The 'medium of fraud' exists in the latter as in the former case; and the effect produced thereby is equally disastrous in both."

As was said by HENSHAW, J., in *Taylor* v. *Morris*,[23] also an oral trust for grantor case:

"The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol."

In *Rochefoucauld* v. *Boustead*,[23a] LINDLEY, L. J., for the court, said:

"It is further established by a series of cases, the propriety of which cannot now be questioned, that the statute of frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself."

It would help some courts to understand that unjust enrichment found in unconscientious retention is just as fraudulent where the original acquisition was honest as where it was dishonest, if they would ask the question why it is remediably fraudulent for a grantee, whose deed by mutual mistake of the parties describes more land than he bought, to attempt to retain the unpurchased excess taken by him innocently enough but retained unjustifiably.[24] The equity of

[22] 8 Colo. 264, 275.

[23] 163 Cal. 717, 722.

[23a] [1897] 1 Ch. 196, 206.

[24] All jurisdictions seem to agree that the statute of frauds does not stand in the way of a reformation which cuts down the property described in the mistaken writing, but some courts refuse to grant reformation to make the writing called for by statute cover property and terms of the contract omitted by mistake. 2 Pomeroy Equity Jurisdiction, 3 ed., §§ 864-867; 34 Cyc. 927, note 61. For a late case, where reformation was decreed so as to include omitted matter, see Atwood v. Mikeska, 29 Okla 69. A leading case

reformation in such a case, while usually stated as an instance of mistake as distinguished from fraud, ought to be classed as fraud in retention[25] and mistake ought to be kept to apply to those cases where there is only mistake. Similarly, fraudulent retention is the sole justification needed for those cases where an absolute deed is deemed in equity a mortgage, because it was delivered and received as security for a debt, and is so deemed despite the fact that the grantee took in good faith and only subsequently decided to retain for himself the legal title conveyed, and despite the fact that the grantee proves that the mortgage arrangement was oral and relies on the statute of frauds.[26]

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for the view that reformation cannot properly be granted, as against the plea of the statute of frauds, if the court will thereby compel the inclusion of property omitted or will otherwise enlarge the scope of the instrument, is Glass v. Hulbert, 102 Mass. 24. The Massachusetts view is defensible only if the line is to be drawn between unjust enrichment and no unjust enrichment. If unjust enrichment is to be the test, then equity should reform contracts which cover too much, to prevent unjust enrichment from taking place through their enforcement, and should reform deeds which convey too much by compelling the restitution of the excess property which, however innocently acquired, is unjustly and therefore fraudulently retained. And if unjust enrichment is to be the sole test, i. e., if the equity jurisdiction is really because of a constructive trust which would or did arise out of the mistake, no reformation will be granted of an instrument required by the statute of frauds to be in writing unless the effect of such reformation will be to diminish the scope of the instrument reformed.

[25] "It is manifest * * * that there was a mutual mistake in the deed. Whether it was the result of fraud, as alleged in the bill, or an error in the description, the defendant fraudulently sought to retain the benefit of the mistake by refusing to cancel the deed."—Wilkin, J., in Cullison v. Connor, *222* Ill. 135, 138.

[26] In Hall v. Linn, 8 Colo. *264*, *274*, Helm, J., for the court, said of the equity doctrine that the statute of frauds will not prevent the enforcement of a constructive trust for fraud: "It was a reliance upon the foregoing principle that induced courts of equity to recognize the well known doctrine that a deed absolute on its face may be proved by parol to be only a mortgage." As Paine, J., for the court, said in Fairchild v. Rasdall, 9 Wis. 379, 391: "I can see no distinction between an express trust and a parol agreement making a deed a mortgage. If the refusal to abide by the latter is to be held, on principle, to be such a fraud as takes the case out of the rule, and justifies parol evidence, I can see no reason why a refusal to execute an express trust evidenced only by parol, should not be so held. The injustice, the wrong and the fraud are not only as great, but greater in the latter case than in the former. For in the former the party would only get the land for the money he had loaned, while in the latter he would get it for nothing." See Kimball v. Tripp, 136 Cal. 631, 634-635; Jasper v. Hazen, 1 No. Dak. 75, 81. While in Fairchild v. Rasdall, 9 Wis. 350, the court could see no difference between the oral trust case and the oral mortgage case, and accordingly deemed that equitable relief should be denied in both situations, it later adopted the oral mortgage doctrine. Plato v. Roe, 14 Wis. 490.

"The well settled jurisdiction of equity to declare a conveyance absolute in form, and given as security, a mortgage, and to compel a reconveyance, presents a close analogy to the case of a parol trust in favor of the grantor. The substantial basis of the jurisdiction is the inequitable conduct of the grantee in receiving the property for one purpose and using it for another, and equity, consequently, imposes upon the grantee, an equitable obligation to restore the property to the grantor upon payment of the mortgage indebtedness. The inequitable conduct of the grantee in retaining the property for his own purposes is sufficient to give equity jurisdiction to declare the deed a mort-

On this subject of a deed on an oral trust for a third person who pays nothing there is a conflict in the authorities. In some jurisdictions a constructive trust will be enforced for the intended *cestui* even though the grantee did not solicit the conveyance, even though there was no fraudulent intent on the grantee's part at the time of the conveyance, and even though there was no breach by the grantee of any confidential relationship other than a family relationship and than the express oral trust relationship.[27] In most jurisdictions, however, no trust whatever will be enforced in the absence of a showing that the grantee solicited the conveyance or that he had an actual fraudulent intent at the time of his promise or that he violated some special confidential relationship.[28] In all jurisdictions, however, a constructive trust will be enforced if any one of the last mentioned showings is made.[29] In practically all jurisdictions it is held that

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gage, despite the parol evidence rule, and the provision of the statute of frauds. That equity should take jurisdiction in such a case, and withhold it in a case where the express obligations of a trustee is repudiated by the grantee and rendered unenforcible by the statute is not only inconsistent, but gives countenance to gross fraud and oppression."—Dean Harlan F. Stone on Resulting Trusts and the Statute of Frauds, 6 Col. L. Rev. 326, 338-339.

[27] Lauricella v. Lauricella, 161 Cal. 61 (semble only, because in California, as ought to be true everywhere, husband and wife living amicably together are deemed to be in a relation of special confidence. Hayne v. Hermann, 97 Cal. 259); Crocker v. Higgins, 7 Conn. 342 (semble, but see Todd v. Munson, 53 Conn. 579 semble contra); Ruhe v. Ruhe, 113 Md. 595 (semble); Fox v. Fox, 77 Neb. 601; Ahrens v. Jones, 169 N. Y. 555; Albright v. Oyster, 19 Fed. 849.

The case of Albright v. Oyster, 19 Fed. 849, supra, was a decision on demurrer. For holdings on the merits, see Albright v. Oyster, 22 Fed. 628, 140 U. S. 493, and for subsequent proceedings, see Oyster v. Oyster, 28 Fed. 909, 140 U. S. 515.

See also the following decisions in accord in jurisdictions where the 7th section of the statute of frauds does not exist. Becker v. Neurath, 149 Ky. 421; Gay v. Hunt, 5 N. C. 141; Sykes v. Boone, 132 N. C. 199; Jones v. Jones (N. C.) 80 S. E. 430; Mee v. Mee, 113 Tenn. 453 (semble, but see Perkins v. Cheairs, 2 Baxt. (Tenn.) 194); Troll v. Carter, 15 W. Va. 567 (semble).

[28] Tillman v. Kifer, 166 Ala. 403; Chester v. Motes, (Ala.) 61 So. 267; Ammonette v. Black, 73 Ark. 310 (semble); Spradling v. Spradling, 101 Ark. 451 (semble); Hovey v. Holcomb, 11 Ill. 660; Smith v. Hollenback, 51 Ill. 223; Lantry v. Lantry, 51 Ill. 458; Scott v. Harris, 113 Ill. 447; Champlin v. Champlin, 136 Ill. 309; Davis v. Stambaugh, 163 Ill. 557; Ryder v. Ryder, 244 Ill. 297; Irwin v. Ivers, 7 Ind. 308; Wright v. Moody, 116 Ind. 175; Goudy v. Gordon, 122 Ind. 533; Pearson v. Pearson, 125 Ind. 341; Meredith v. Meredith, 150 Ind. 299 (semble); McClain v. McClain, 57 Ia. 167; Acker v. Priest, 92 Ia. 610 (semble); cf. Byers v. McEniry, 117 Ia. 499; Willis v. Robertson, 121 Ia. 380; Rogers v. Richards, 67 Kans. 706; Philbrook v. Delano, 29 Me. 410; Bartlett v. Bartlett, 14 Gray 277 (semble); Moran v. Somes, 154 Mass. 200; Calder v. Moran, 49 Mich. 14; Thompson v. Marley, 102 Mich. 476; Sheldon v. Carr, 139 Mich. 654; Longe v. Kinney, 171 Mich. 312; Randall v. Constans, 33 Minn. 329; Luse v. Reed, 63 Minn. 5 (semble); Metcalf v. Brandon, 58 Miss. 841; Arnwine v. Carroll, 8 N. J. Eq. (4 Halst. Ch.) 620; Salter v. Bird, 103 Pa. St. 436; Rogers v. Rogers, 52 S. C. 388 (semble); Whiting v. Gould, 2 Wis. 552. See Skett v. Whitmore, 2 Freem. Ch. (Eng.) 280.

[29] In the following cases it was held that there was a trust for the intended cestui because of solicitation of the conveyance, because of actual fraud at the time of the oral promise, or because of the breach of a special confidential relationship. McDonald v. Tyner, 84 Ark. 189; Nordholt v. Nordholt, 87 Cal. 552; Hayne v. Hermann, 97 Cal.

the constructive trust must be enforced for the intended *cestui*, if for anybody.[30] No jurisdiction, it seems, holds squarely that the trust must be enforced for the grantor.[31]

259; Lauricella v. Lauricella, 161 Cal. 61; Dieckmann v. Merkh, 20 Cal. App. 655, 130 Pac. 27; In re Fisk, 81 Conn. 433 (cf. Hayden v. Denslow, 27 Conn. 335); Holmes v. Holmes, 106 Ga. 858 (semble, but see McKinney v. Burns, 31 Ga. 295 semble contra that the trust should be for the grantor and not for the intended cestui); Fishbeck v. Gross, 112 Ill. 208; Larmon v. Knight, 140 Ill. 232; Stahl v. Stahl, 214 Ill. 131; Crossman v. Keister, 223 Ill. 69; Hilt v. Simpson, 230 Ill. 170; Ward v. Conklin, 232 Ill. 553; Newis v. Topfer, 121 Ia. 433; Pollard v. McKenney, 69 Neb. 742; Schneringer v. Schneringer, 81 Neb. 661; Goldsmith v. Goldsmith, 145 N. Y. 313; McClellan v. Grant, 83 N. Y. App. Div. 599 (aff'd 181 N. Y. 581). Compare Rollins v. Mitchell, 52 Minn. 41, and Gates v. Kelley, 15 N. D. 639, where, on conveyance obtained by the false representation that it was to benefit a third person, a trust in favor of that person was enforced.

[30] See cases in notes 27 and 29, supra. In most of the cases denying a trust for the intended cestui (see note 28, supra), it seems to be the silent assumption that if that cestui can't enforce a constructive trust nobody can. See Farrand v. Beshoar, 9 Colo. 291; Willis v. Robertson, 121 Ia. 380; Moran v. Somes, 154 Mass. 200. It was held that nobody could in Irwin v. Ivers, 7 Ind. 308, where the plaintiffs were both the heirs of the grantors and the intended beneficiaries.

[31] It has been supposed that certain cases from Colorado, Georgia and Missouri support the view that the trust should be decreed for the grantor (see 20 Harv. Law Rev. at p. 554, note; 1 Calif. Law. Rev. at p. 334) but in none of those states is there an actual decision in his favor as against the intended cestui. In Hall v. Linn, 8 Colo. 264, the grantor was suing for the balance due him after the grantee, a creditor of his, had paid himself out of the proceeds of the working and sale of a mine conveyed for that purpose and for the purpose of paying other creditors and returning the surplus to the grantor. It was not a case where the third parties—the other creditors—were seeking to enforce a trust, and as the court was not asked to consider the rights of those other creditors it would seem to be a fair inference that they had been paid by plaintiff prior to suit. Hall v. Linn seems to have been a case where an oral trust for the grantor was enforced in the grantor's favor because of fraud in the acquisition of title (8 Colo. at p. 275) and of the fiduciary relation between the parties (8 Colo. at p. 276), though the court apparently did think that fraud in retention would be enough (8 Colo. at p. 275). Von Trotha v. Bamberger, 15 Colo. 1, where a trust was not enforced, was not a case where the grantor could have any right, for he was paid in full for his conveyance. The only question there was whether the grantee, who paid the purchase price to the grantor, was a resulting trustee by way of mortgage, or a constructive trustee, of an undivided half interest in the property, or was bound by an oral contract to convey an undivided half of the property because of part-performance. It does not have any bearing on the question of the conflicting claims of grantor and of intended beneficiaries where the grantee takes on an oral promise to hold for, or to convey or devise to, third persons and then repudiates all obligation. McKinney v. Burns, 31 Ga. 295, which also has been cited in favor of the grantor, was a case where the intended cestuis and the grantor united as plaintiffs in the suit to enforce the trust and no conflict arose between them. The Georgia court now seems to recognize the superior claims of the intended cestuis in any case where a trust is enforceable. See Holmes v. Holmes, 106 Ga. 858, where the intended cestuis were also the heirs of the resulting or constructive cestui who had the deed made. In Peacock v. Peacock, 50 Mo. 256, 261, an express dictum supports the claims of the grantor as against the intended cestui. The case itself, however, was one of a conveyance on an oral agreement of the grantee to sell for the grantor and account to him.

In Newis v. Topfer, 121 Ia. 433, where a trust was enforced because of breach of special confidential relationship, the court said that there was a trust for the grantor and after her death for her heirs, (p. 441); but in that case the grantor's heirs and the in-

In Massachusetts it seems that a constructive trust will be enforced for neither the grantor nor the intended *cestui.*[32] There the grantor probably would be allowed to recover the value of the land.[33]

For any trust to be enforced for the intended *cestui,* it must be clear that all conditions precedent attached to the carrying out of the oral trust have happened.[34]

SITUATION 3.

Where one person pays the purchase money and has the conveyance made to another who agrees orally to hold in trust for, or to convey or to devise to, a third person.

The case where one man pays the purchase money and the title is conveyed by absolute deed to another who orally agrees to hold in trust for, or to convey or to devise to, a third person, is, like situation 1, only a variation of situation 2. It is more like situation 2

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tended cestuis were in fact the same parties, and the court later showed that its earlier remark was inadvertent by stating on p. 442 that "it is to be said that a confidential relation existed between the parties, and in such a case, even though there be no fraud on the part of a grantee in procuring a conveyance to be made to him, still equity will decree the existence of a constructive trust and enforce the same according to the understanding of the grantor as far as such can be ascertained" and by adding on p. 443 that because of the confidential relationship to the grantor sustained by the grantee "it follows that from the beginning his relation to the property and to the cestui que trust must be regarded precisely as though the terms of the trust had been declared in the deed itself."

[32] Moran v. Somes, 154 Mass. 200. That it will not be enforced for the intended cestui, is stated in Campbell v. Brown, 129 Mass. 23, 25, which, however, was not a case of conveyance on oral trust. The case of Howe v. Howe, 199 Mass. 598, is not even semble contra to the dictum in that case, for the grantor who conveyed on an oral trust for the third person was a resulting trustee of the third person, as the grantee knew, and, accordingly, the case was purely one of following trust property. The grantee was a constructive trustee, though the court called him a resulting trustee.

[33] See Basford v. Pearson, 9 Allen, (Mass.) 387; Twomey v. Crowley, 137 Mass. -84. Compare Logan v. Brown, 20 Okla. 334, 336.

[34] In Kimball v. Tripp, 136 Cal. 631, the grantee took title as agent of the grantor to make a certain disposition of the property, but the death of the grantor before the disposition was made ended the agency. Since the agent grantee could not be allowed to keep, the heir of the grantor was allowed to take as constructive cestui. In Arnwine v. Carroll, 8 N. J. Eq. (4 Halst. Ch.) 620, it was intimated that if there was an oral trust and if the oral trust was intended to be a spendthrift one, the court, which could not of course enforce the express trust and did not care to enforce the constructive trust cy pres the grantor's orally expressed intentions, to the exclusion of the intended cestui's creditors, would have to allow the trustee to keep for himself, since in any event the intentions of the creator of the trust could not be enforced. In the same case it is said that if the oral promise of the grantee is to pay the beneficiary a specified sum of money without restriction he should sue at law. But in Ahrens v. Jones, 169 N. Y. 555, the court allowed the beneficiary to recover in equity a specified sum of money promised by the grantee. See also Fox v. Fox, 77 Neb. 601. The New Jersey court did not regard the land conveyed as a trust res or as subject to an equitable lien to secure the payment of the money. For lack of a trust res, there is, of course, no trust where the grantee really gets nothing under the deed. Loomis v. Loomis, 148 Cal. 149.

than is situation 1, for in both situations 2 and 3 the third person for whom the grantee orally agrees to hold in trust or to whom he agrees to convey or to devise pays nothing, but it resembles situation 1, because in situation 3, as in situation 1, the payer of the purchase money may come forward in his own behalf or be put forward by the grantee as the proper constructive trust *cestui,* if one there must be.

In situation 3, as in situation 1, it is necessary to determine the nature of the trust. It would seem clear on principle that in situation 3, as in situation 1, the trust is not resulting but constructive. It cannot be resulting in principle because the arrangement was express at the start, with no room for presumption or inference; and since the express oral trust or promise cannot be enforced because of the plea of the statute of frauds, the only possible trust to enforce is a constructive trust. There is on sound principle a constructive trust or nothing, and as there would be just as much unjust enrichment of the grantee here as in situation 1, if he were allowed to keep for himself, it is properly a constructive trust.

But while the trust enforced is properly constructive, the question of whether that constructive trust should be enforced in favor of the intended *cestui* is not quite the same as in situation 2, for in situation 3 the payer of the purchase money—who, as such, is much exalted in the resulting trust cases—may set up a claim to the constructive *cestui*-ship. It seems reasonable to conclude, however, that the payer of the purchase money ought to stand in equity in no more favorable a position than if he had taken title himself and then had deeded to the grantee on an oral trust for the third person. If he had done that, the intended *cestui* ought to be deemed the constructive *cestui,* and, accordingly, he ought to be held to be such *cestui* in situation 3, despite any claim of *cestui*-ship put in by or for the payer.

Here, however, as in the preceding case, Dean AMES invoked the principle of *restitutio in integrum* to give the payer the better claim.[35] That principle could not be applied literally, of course, for the grantor could not be compelled to refund the purchase money to the payer—the grantor is not concerned in the grantee's default—but an approximation to it is possible. The principle of *restitutio in integrum* not being capable of literal application here, its nearest approximation, according to Dean AMES, would be to make the grantee hand over the property to the payer of the purchase

[35] Ames, Lectures on Legal History 433, note. See same passage in 20 Harv. L. Rev. 549, 556, note.

money.[36] That is not a necessary conclusion, however. The payer by his payment would seem to have put himself, as noted above, in no better position in equity than if he had gotten a deed from the vendor and had himself conveyed to the grantee on the oral trust for the third person, which was situation 2 *supra;* and we are forced to conclude, as with reference to situation 2 we concluded, that the fraud worked by the grantee is worked on the intended *cestui,* who, therefore, should be named as *cestui* of the constructive trust, and that even on the *restitutio in integrum* principle this should be true where the fraud was an afterthought of the grantee's. The payer of the purchase money in situation 3, and the grantor in situation 2, can make no sound complaint at that action because the result is in effect what each sought to accomplish, and the grantee, admittedly a grievous wrongdoer and as such to be whipped of justice, should not be allowed to dictate who shall be *cestui* of the constructive trust enforced against him.

As was to be expected, there is a conflict of authority as to the proper disposition of situation 3, and that regardless of whether a state statute abolishes resulting trusts. In some jurisdictions the intended beneficiary is allowed to enforce a constructive trust,[37] and in others he is not.[38]. In the jurisdictions holding that he is not to be allowed to enforce a trust, the statutes either abolish the presumption of a resulting trust or the trust itself, so presumably in such jurisdictions the grantee may keep free from any trust.[39] In one federal case the payer was given the benefit of a resulting trust on the theory that the intended *cestui,* if he had any rights, was *cestui* of a trust of which the payer, as resulting trust *cestui,* was trustee.[40] That the payer takes as so called resulting, but really constructive,[41] *cestui,* if the intended *cestui* cannot take and if there is no statute forbidding such taking by the payer, seems clear.[42]

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(To be concluded.)

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[36] Id.

[37] Sieman v. Austin, 33 Barb. 9; S. C. aff'd sub nom. Siemon v. Schurck, 29 N. Y. 598; Pfeiffer v. Lytle, 58 Pa. (8 P. F. Smith) 386; Smoke v. Smoke, 11 Va. Law. Reg. 747; Hardman v. Orr, 5 W. Va. 71. See Emmons v. Moore, 85 Ill. 304.

[38] Rooker v. Rooker, 75 Ind. 571; Randall v. Constans, 33 Minn. 329; Connelly v. Sheridan, 41 Minn. 18. See Shafter v. Huntington, 53 Mich. 310.

[39] But see Randall v. Constans, 33 Minn. 329, 336-338.

[40] In re Peabody, 118 Fed. 266.

[41] While really constructive, the trust may nevertheless have been intended by the legislature to be hit by a statute applying expressly to resulting trusts.

[42] In re Davis, 112 Fed. 129; Heiskell v. Trout, 31 W. Va. 810.